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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1068

LEONARD THOMPSON,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, First Appellate District, State of California

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THE PEOPLE OF THE STATE OF CALIFORNIA,
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PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, First Appellate District,
State of California

Leonard Thompson respectfully petitions that a writ of certiorari issue to the Court of Appeal, First Appellate District, State of California, to review the decision and judgment of that Court affirming the judgment of conviction of petitioner in the Superior Court of the State of California, in and for the County of San Francisco.

OPINIONS BELOW

The opinion of the California Court of Appeal (Appendix I) is reported in *People v. Thompson,* 252 Adv.Cal.App. 76 (1967). The denial of petitioner's petition for a hearing in the Supreme Court of California (Appendix II) is reported in 67 Adv. Cal. No. 7, "Minutes," p. 4 (1967).

JURISDICTION

The decision of the California Court of Appeal was filed on June 28, 1967; petitioner's petition for a hearing in the Supreme Court of California was denied on September 21, 1967. On December 14, 1967, Mr. Justice Douglas granted petitioner's request to extend the time to file petition for writ of certiorari. The time was extended to and including January 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I

Whether the Sixth Amendment's guarantee of trial by jury applies to state criminal proceedings.

II

Whether a trial judge's statement to a jury that, in his opinion, the accused is guilty beyond a reasonable doubt is a deprivation of the right to trial by jury.

III

Whether a trial judge's statement to a jury that, in his opinion, the accused is guilty beyond a reasonable doubt is a deprivation of due process of law.

IV

Whether a trial judge's statement to a jury that, in his opinion, the accused is guilty beyond a reasonable doubt can be considered harmless error.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment, Due Process Clause:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law. ..."

Constitution of the United States, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. ..."

STATEMENT OF THE CASE

Judgment of conviction finding petitioner guilty of violating California Penal Code sections 209 (kidnaping for the purpose of committing robbery), 245 (b) (assault with a deadly weapon on a police officer), 211 (two counts) (robbery), and 12021 (possession

of a firearm by a person previously convicted of a felony) was entered on September 3, 1965 (Clerk's Transcript, 18-20). The Clerk's Transcript on Appeal, the Reporter's Transcript on Appeal (hereafter "R. T."), as well as the Reporter's Transcript on Appeal of the Opening and Closing Arguments of the District Attorney, have been certified to this Court. The facts developed from those documents reveal the following:

On May 19, 1965, two men gained entry to the Riskin home in San Francisco. One of them was armed with a gun (R.T. 34), the other with a knife (R.T. 51). They took money and some other belongings of the Riskins (R.T. 39, 50-51, 54). During the course of this intrusion one of the men forced one of the victims to go from the living room to the bedroom for the purpose of finding money and jewelry (R.T. 38-39).

While the robbery was in progress the police arrived and knocked at the door (R.T. 42). As the police entered the men left by a side door (R.T. 43). One of the officers, Frank Kerlin, observed a man, a Negro with a moustache, standing at the side door of the house. The man fled and Kerlin fired at him (R.T. 87). Kerlin decided to pursue the robbers in his police vehicle and so informed the central communications unit (R.T. 88-89).

Officers Arthur Garrens and Herman Clark received a radio call informing them of the pursuit (R.T. 12). They proceeded to the area and, on foot, began a search for the suspect (R.T. 123-124). Petitioner, a Negro with a moustache, was discovered, by

Garrens, in some bushes. He emerged from the bushes and, according to Garrens, attacked with a knife (R.T. 125-127). Petitioner was subdued by Garrens with the assistance of Clark (R.T. 127-128). Items taken from the Riskin residence were discovered in petitioner's possession (R.T. 94-96). The following morning a mask was discovered in the patrol car in which petitioner had been placed after his apprehension (R.T. 71-73). Both of the intruders wore masks (R.T. 34, 49).

Another piece of evidence was uncovered on the following morning. A ten-year old boy, who lived near the Riskins and saw the arrest of petitioner, discovered a loaded gun in his yard (R.T. 62-63). The gun was turned over to the police (R.T. 96).

A subsequent search of petitioner's hotel room produced a bullet casing (R.T. 193). According to the testimony of an expert the casing was probably fired from the gun discovered in the yard on the day after the robbery (R.T. 197-198, 203).

At the trial petitioner testified in his own behalf. He denied participating in the robbery (R.T. 211). He was, however, in the vicinity at the time of the robbery and it was there that he discovered an abandoned coat (R.T. 212). He found the Riskin items later discovered by the police in a pocket of the coat. He also found a gun in a pocket and threw it into the bushes (R.T. 213). He concealed himself in the bushes when he heard voices warning that they were about to shoot. A woman disclosed his hiding place to the

officers (R.T. 214). Petitioner emerged from the bushes with his hands up as the officers requested. They then told him to put his hands on his head and get down on his knees. He complied (R.T. 215). He at no point used a knife and was, instead, the victim of an unprovoked attack by the officers (R.T. 216-218). Petitioner was thoroughly searched before being placed in the police car; except for some papers and a pocket knife contained in the pockets of his tight-fitting jeans, everything was removed from him before he entered the police car (R.T. 219-221). At the police station he was beaten again and, as a consequence, spent twenty-three days in the hospital (R.T. 222-223).

Before the trial petitioner attempted to plead guilty to lesser charges. He was supported in this attempt by the prosecutor. The Court, however, refused to permit entry of the guilty plea (R.T. 11). Petitioner asked to speak to the Court about the offense, and after the prosecutor represented that nothing he said would be used against him (R.T. 12), made a highly incriminating statement (R.T. 12-15). The Court remained adamant in its refusal to permit entry of the plea of guilty (R.T. 17-18).

After all the evidence had been introduced at the trial, the judge, in his charge to the jury, said:

> "It is the opinion of this court based upon the evidence in this case that the defendant, Leonard Thompson, has been proved beyond a reasonable doubt to be guilty of each of the charges of the indictment. The charges of the indictment, now,

are Count One, charges him with kidnaping to commit robbery, a violation of 209 of the Penal Code; Counts Two and Three charge the defendant with robbery against Mrs. Riskin and Dr. Riskin, respectively. Count Four charges the defendant with an assault with a deadly weapon upon a peace officer, and Count Five charges him with possession of a firearm capable of being concealed upon the person while at a time when the defendant had been previously convicted of a felony. Now, I caution you that it is your right and your duty to exercise the same independence of judgment in weighing my comment on the evidence as you are entitled to exercise in weighing the testimony of any witness and the arguments of counsel.

"You will keep in mind that you are the exclusive judges of the credibility of the witnesses and of all questions of fact submitted to you. Such authority as the trial judge has to express his personal thoughts on any of these matters is confined to the sole purpose in aiding you in arriving at a verdict and may not be used, and is not used in this case, to impose his will upon you or to compel a verdict." (R.T. 258)

Petitioner was not identified as one of the robbers (see R.T. 49, 80). The entire case against him was based on circumstantial evidence.

REASONS FOR GRANTING THE WRIT

The instant case presents a significant and unresolved question of constitutional law. In *Parker v. Gladden*, 385 U.S. 363 (1966) this Court held that a bailiff's remark to a juror, "Oh that wicked fellow, he is guilty," resulted in a deprivation of an impartial trial by jury. The instant case raises the question of whether a more emphatic expression of belief in an accused's guilt by a judge to an entire jury results in a similar deprivation.

Most states that have passed on the question have found such comment error.[1] There are, however, exceptions.[2] The Federal Circuit Courts are also apparently divided over the question of whether comment on the guilt of the accused is ever proper and, if so, under what circumstances. In *United Brotherhood v. United States*, 330 U.S. 395, 408 (1947), it was said

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[1]See, e.g., *People v. Brock*, 66 Adv. Cal. 672 (1967); *Hamilton v. State*, 109 So.2d 422, 424-425 (Fla. Ct. App. 1959); *McFarland v. State*, 109 App. Ga. 688 (1964); *People v. Sprinkel*, 27 Ill.2d 398 (1963); *State v. Knutson*, 47 Idaho 281 (1929); *People v. Barley*, 76 Ill.App.2d 310 (1966); *State v. Bean*, 179 Kan. 373 (1956); *People v. Bigge*, 297 Mich. 58 (1941); *State v. Sedillo*, 76 N.M. 273 (1966) (dicta); *People v. Spitzer*, 294 N.Y. 5 (1944); *People v. Rafkind*, 3 N.Y.S.2d 997, 254 App.Div. 742 (1938); *State v. Anderson*, 263 N.C. 124 (1964); *People v. Clark*, 340 Mich. 411 (1954); *State v. Sanders*, 360 S.W.2d 722 (S.Ct. Mo. 1962); *State v. Pruitt*, 187 S.C. 58 (1938); *State v. Kallas*, 97 Utah 492 (1939); *Stoots v. Commonwealth*, 192 Va. 857 (1951); *Holober v. Commonwealth*, 191 Va. 826 (1951); *State v. Weinman*, 20 Wis.2d 106 (1963).

[2]*State v. Begyn*, 34 N.J. 35 (1961); *Commonwealth v. Ott*, 417 Pa. 269 (1965); *Commonwealth v. Raymond*, 412 Pa. 194 (1963). In Pennsylvania, however, if, from the judge's comment on a defendant's guilt the jury can reasonably conclude that the judge is in the possession of facts unknown to them, the comment is reversible error. *Commonwealth v. Young*, 418 Pa. 359 (1965).

that a judge may not direct a verdict no matter how conclusive the evidence. A judge's statement that an accused is, in his opinion, guilty, is not, technically speaking, a "direction" and so the courts have relied on an earlier case to determine whether such a remark is error when it does not rise to the level of a directed, or partially directed, verdict. That case is *United States v. Murdock,* 290 U.S. 389, 394 (1933), where this Court said: "Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases." *Horning v. District of Columbia,* 254 U.S. 135 (1920) was cited as an example of an exceptional case. *Horning* is, truly, an exceptional case. In *Horning* not only were the facts not disputed, they were agreed to by both parties. Some circuit courts have taken the *Murdock dicta* to mean that a judge may comment on the ultimate question of the accused's guilt only in a circumstance similar to that of *Horning.*[3] Others have suggested that such comment is never proper.[4] And some have stretched the *Murdock* language to uphold comment where the facts are not agreed to and are in dispute.[5]

Whether comment on the accused's guilt is a deprivation of the right to an impartial jury trial is, therefore, a question that needs to be resolved because of

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[3] *McBride v. United States,* 314 F.2d 79 (10 Cir. 1963); *United States v. Woods,* 252 F.2d 334 (2d Cir. 1958).

[4] *United States v. Ornstein,* 355 F.2d 222 (6 Cir. 1966).

[5] *Heinecke v. United States,* 294 F.2d 727 (D.C. Cir. 1961), cert. den. 368 U.S. 901 (1961); *Northern California Pharmaceutical Association v. United States,* 306 F.2d 379 (9 Cir. 1962).

a conflict among the circuits and the states. There is one other reason that compels resolution of the issue. If, as petitioner maintains, comment by a judge on his guilt is a deprivation of a right guaranteed by the United States Constitution, he is entitled to the benefit of the "harmless error" rule announced by this Court in *Chapman v. California*, 386 U.S. 18 (1967). So are other defendants similarly situated in states which, like California, consider comment error but do not consider it an infringement on a federal right requiring the rigorous *Chapman* test.

I

THE FOURTEENTH AMENDMENT REQUIRES TRIAL BY JURY.

This Court has held that the Sixth Amendment guarantee of trial by jury applies to criminal proceedings. In *Parker v. Gladden*, 385 U.S. 363 (1966), this Court held that "The command of the Sixth Amendment . . . that 'the accused shall enjoy the right to a . . . trial by an impartial jury . . . ' [is] made applicable to the States through the due process clause of the Fourteenth Amendment." 385 U.S. at 364. See *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961).[6]

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[6]See also *United States ex rel. De Lucia v. McMann*, 373 F.2d 759, 762 (1967); *People v. De Lucia*, 20 N.Y.2d 275, 281 (1967) (dissenting opinion of Van Voorhis, J.). This Court has noted probable jurisdiction in a case raising the question of the extent to which the Sixth Amendment guarantee of jury trial applies to state proceedings (No. 410, this term); and in *Bloom v. Illinois* (No. 52, this term) the Court will consider the extent to which the rule announced in *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), applies to criminal contempt proceedings in state courts.

Parker thus overruled, *sub silencio*, *Maxwell v. Dow*, 176 U.S. 581 (1900) and *dicta* in other cases; see, *e.g.*, *Fay v. New York*, 332 U.S. 261, 288 (1947); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), indicating that the right to trial by jury was not secured by the Fourteenth Amendment.

Constitutional law which has emerged since the *Maxwell* decision completely undermines its rationale. It was predicated, as was *West v. Louisana*, 194 U.S. 258, 264 (1904), on the notion that the Fourteenth Amendment does not make any of the specific guarantees of the Sixth Amendment applicable to the states. But, before *Parker*, this Court had held every guarantee of the Sixth Amendment, except the right to trial by jury, applicable to state criminal proceedings. See *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (public trial and notice of the accusation); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

In light of those decisions it would have been curious indeed if the Sixth Amendment guarantee of jury trial were the only particular in the Sixth Amendment not applicable to state court criminal proceedings. Bill of Rights guarantees are applicable to such proceedings when the right is "so fundamental and essential to a fair trial that it is incorporated in the

due process clause of the Fourteenth Amendment." *Washington v. Texas,* 388 U.S. at 17-18. In *Pointer v. Texas, supra,* this Court stated: "[t]hat the fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the beliefs of the framers of those liberties and safeguards that [it is] a fundamental right essential to a fair trial in a criminal prosecution." 380 U.S. at 404.

By providing the right to trial by an impartial jury, the framers placed in the Sixth Amendment the most fundamental safeguard to a fair trial. That right is traceable to the earliest Saxon colonies, III *Blackstone, Commentaries* 349, and constituted one of the principal articles of Magna Charta. *Blackstone* described it as "the most transcendent privilege which any subject can enjoy or wish for. . . ." *Id.,* at 379. The right was expressly included in the English Bill of Rights of 1689,[7] one of the basic sources for the Bill of Rights to the United States Constitution. Rutland, *The Birth of the Bill of Rights,* 1776-1791, p. 19 (1955).

When the framers of the Declaration of Independence composed their list of grievances they included the denial "in many cases, of the benefit of trial by jury." The former crown colonies remedied that by, without exception, including the guarantee of trial by jury in criminal cases in every constitution adopted between the War of Independence and the formation of the American Union. See Thorpe, *The*

[7] I Will. III and Mary II, Sess. 2, c. 2 (1689), para. 11.

Federal and State Constitutions, Colonial Charters, and Other Organic Laws, V, 2594-98 (1909).

Trial by jury in criminal cases is one of the very few individual rights that the framers included in the body of the United States Constitution. Article III, section 2. See *The Federalist,* No. 83 (Hamilton). It is the only such provision restated in the Bill of Rights. See *Toth v. Quarles,* 350 U.S. 11, 16 (1955).

The history of the right to trial by jury in criminal cases establishes it as one of the most fundamental of rights preserved in the United States Constitution. Accordingly, it applies to state criminal proceedings by virtue of the Fourteenth Amendment.

II

THE JUDGE'S STATEMENT TO THE JURY DEPRIVED PETITIONER OF HIS RIGHT TO AN IMPARTIAL JURY TRIAL.

Petitioner was, in effect, tried by a judge and not a jury.

In *Parker v. Gladden, supra,* this Court held that a statement by a bailiff conveying his view that the defendant was guilty resulted in a deprivation of the right to an impartial jury trial guaranteed by the Sixth and Fourteenth Amendments.

Jurors may rely on statements of bailiffs and they may place a great deal of confidence in the views of those who see to their welfare, see *Turner v. Louisiana,* 379 U.S. 466 (1965), but they do not have the influence of a judge.

The judge is the dominant figure in the courtroom, a courtroom designated as the court of the magistrate presiding. He overshadows the lawyers, the witnesses and the litigants. In the jurors' minds he is identified as a person of superior wisdom in matters of law, superior experience as to matters of fact and, other than the jurors themselves, the only nonpartisan in the courtroom.

The jurors also know the judge has access to information about the case before them that is unavailable to them. They know that proceedings occur outside their presence and that those proceedings have to do with what evidence will be presented to them and what evidence will not be presented to them.

When the judge speaks it is the jurors' duty to listen and when he tells them that the accused is guilty beyond any reasonable doubt on each individual count, they are going to listen very closely, and act accordingly. The judge's admonition that his statement is to receive no more weight than any other testimony is not going to dilute the impact. His statement will have more weight because, unlike the other testimony, it has not been subjected to cross-examination and, unlike the other testimony, it has come from an ostensibly impartial source with access to every fact in the case.

In the instant case the judge suggested to the jurors that evidence might be kept from their consideration (R.T. 23-24), and evidence that had been alluded to (R.T. 32-33, Reporter's Transcript on Appeal of Opening and Closing Arguments of the Dis-

trict Attorney, p. 3) was excluded (R.T. 161-162). Additionally, petitioner, prior to trial and after a representation by the prosecutor that nothing he said would be used against him (R.T. 12) made some highly incriminating admissions (R.T. 13-15).

In *Parker v. Gladden*, the comment was made by a bailiff, a person not available for cross-examination and a person whom the jurors might reasonably conclude knew more about the case than they did.

Here the comment was made by a person who could not be cross-examined, a person whom the jurors *knew* had information unavailable to them and a person who in fact had such information.

The practical effect is that petitioner was deprived of his right to trial by jury. The judge usurped the jury's function. "The very object of the jury system is to secure unanimity by a comparison of views, and by agreement among the jurors themselves." *Allen v. United States*, 164 U.S. 492, 501 (1896). The verdict in this case was the product of the thinking of a single man, a view untested by any confrontation with contrary views.

This single man, in arriving at his verdict, was undoubtedly influenced by admissions and a confession that could not have been placed before the body charged with the reponsibility of trying the facts. In *Jackson v. Denno*, 378 U.S. 368 (1964) this Court gave constitutional recognition to the danger to due process inherent whenever a single body determines both the admissibility of evidence and the guilt or innocence of the accused. If a judge, aware, as the

judge was here, of inadmissible admissions may comment upon the guilt of the accused, the defendant's constitutional right to have illegally obtained evidence and other inadmissible evidence "entirely disregarded," *id.* at 389, is illusory.

In *United States v. Murdock, supra,* 290 U.S. 389, 394 (1933), this Court said that, "in exceptional cases" a judge has the power to comment on the guilt of the accused. The Court noted that *Horning v. District of Columbia, supra,* 254 U.S. 135 (1920) was the sort of case it had in mind. In *Horning* no facts were in dispute, they were all agreed to. It was not the theory of the defense that the defendant had not committed the proscribed acts but only that those acts were not a violation of the law. The case is thus analogous to the situation in which an element of a crime is not contested under the theory of the defense and the judge thus assumes the elements proved in his charge to the jury.

For example, in a prosecution for passing counterfeit currency, where the defense is a lack of knowledge about the counterfeit character of the currency, it is not improper for a judge to assume in his instructions to the jury that the bills were in fact counterfeit even though that is one of the elements of the crime.[8] In a prosecution for forcible rape where the theory of the defense is mistaken identity, an instruction on lack of consent, an element of the

[8] See, *e.g., United States v. Jonikers,* 147 F.2d 675 (7 Cir. 1952), cert. den. 344 U.S. 877 (1952); *Wellman v. United States,* 297 F. 925 (6 Cir. 1924); compare with *Mims v. United States,* 375 F.2d 135, 147-148 (5 Cir. 1967).

crime, might prejudice the defendant. The genesis of the *Horning* rationale is obvious. Even so, petitioner submits that the dissent of Justice Brandeis, speaking for three of the four dissenters in *Horning,* is the sounder view. When a defendant pleads "not guilty" he is entitled to have the trier of fact, the jury, decide the ultimate issue without having the judge overcome their "will by the weight of his authority." *Id.* at 139 (dissenting opinion of Brandeis, J.).

But even if *Horning* is good law it has no application here. The facts were not agreed to. They were sharply contested. This is not the "exceptional case" in which comment would be proper. Under the rationale of *United States v. Murdock, supra,* the comment was improper and requires reversal.

The Sixth Amendment to the United States Constitution guarantees the petitioner the right to a trial by jury. He can constitutionally be convicted only by the unanimous decision of twelve peers, after consultation among themselves about the evidence developed against him from the witness stand, finding him guilty of the proscribed acts beyond any reasonable doubt. He has not received that jury trial.

III

THE STATEMENT OF THE TRIAL JUDGE DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

Even if it be assumed that the Sixth Amendment's guarantee of trial by jury does not apply to the states, this Court has recognized that once jury trial is afforded, the Fourteenth Amendment commands that the trial be before an impartial jury. *Turner v. Louisiana, supra; Irvin v. Dowd,* 366 U.S. 717 (1961).

Petitioner did not receive an *impartial* jury trial. *Parker v. Gladden, supra,* held that a much less comprehensive expression of belief in guilt emanating from a much less influential source and directed to fewer jurors in a situation not ostensibly authorized by the trial process resulted in a jury trial that did not meet the standard of impartiality. The error in the immediate case is more obvious and more egregious.

Parker, it might be argued, is distinguishable by this line of reasoning: It is true that a bailiff's comments carry less weight than a judge and that a judge's remarks are liable to have a greater influence on a jury, but a bailiff could not have tried the defendant. Since the states are not required to provide a trial by jury a judge could have decided the question of guilt or innocence on his own and an expression of opinion on his part would have been necessary.

The flaw in that reasoning is that California does provide for trial by jury. Petitioner, relying upon the division of functions and assuming that the jury would actually be the trier of fact, made incrimi-

nating admissions to the judge after the District Attorney had represented that his statements would not be used against him. The judge, who could not help but be influenced by those statements, then expressed his opinion on the guilt of petitioner to the jury.

Petitioner, no less than Parker, was denied the right to a trial by an impartial jury on the evidence developed in Court.

IV

THE STATEMENT OF THE TRIAL JUDGE WAS PREJUDICIAL ERROR.

The Court below recognized that the judge's comment was improper but, finding no violation of any constitutional right, *People v. Thompson,* 252 Adv. Cal.App. 76, 93 (1967), concluded that it was harmless error applying the "miscarriage of justice" test provided in California Constitution, Article VI, section 13. *Id.,* at 94.[9]

The California Court of Appeal was, as noted above, in error when it decided that no federal constitutional right had been infringed by the comment. The harmless error rule applied by it does not meet the standard required in cases where error is of constitutional dimension. *Chapman v. California,* 386

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[9]And see *People v. Brock,* 66 Adv.Cal. 672, 682 (1967).

U.S. 18 (1967); and see *Anders v. California,* 386 U.S. 264 (1967).[10]

Nor was the comment conceivably harmless.

The harmless error rule goes to technical errors not affecting the substantial rights of a defendant. *Bollenbach v. United States,* 326 U.S. 607, 614 (1946); *Weiler v. U.S.,* 323 U.S. 606, 611 (1945).[11] The error in the immediate case, affecting as it did one of the most fundamental of rights, the right to an impartial jury trial, is not a "technical error."

This Court has long recognized that there are certain errors of such magnitude that they are inherently prejudicial. See *Jackson v. Denno,* 378 U.S. 368, 376-77 (1964); *Haynes v. Washington,* 373 U.S. 503, 518-19 (1963); *Spano v. New York,* 360 U.S. 315, 324 (1959); *Payne v. Arkansas,* 356 U.S. 560 (1958) (coerced confessions); *White v. Maryland,* 373 U.S. 59, 60 (1963); *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Hamilton v. Alabama,* 368 U.S. 52, 55 (1961) (right to counsel).[12]

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[10]California's substantive rule ("It is not reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error") is not only less stringent than the rule announced by this Court but the California rule puts the burden of establishing prejudicial error on the appellant who is attacking the verdict. See *People v. Watson,* 46 Cal.2d 818, 836-38 (1956).

[11]For a thoughtful and scholarly discussion of this point see *People v. Ross,* 67 Adv.Cal. 58, 70-80 (1967) (Traynor, C.J., dissenting).

[12]And see *Wood v. U.S.,* ..... U.S. ....., 19 L.ed.2d 20 (1967) (right to counsel); *Roberts v. LaVallee,* ..... U.S. ....., 19 L.ed.2d 41 (1967) (equal protection). In *Miller v. California,* No. 154, 19 L.ed.2d 459 (1967), this Court has posed the question of whether certain kinds of inculpatory admissions may ever be considered harmless error.

This Court's rule of "inherent prejudice" has always been invoked when an error has resulted in the denial of trial by an impartial jury. *Parker v. Gladden, supra,* 385 U.S. at 365; *Sheppard v. Maxwell,* 384 U.S. 333, 352 (1966); *Estes v. Texas,* 381 U.S. 532, 542-543 (1965); *cf. Rideau v. Louisiana,* 373 U.S. 723, 727 (1963); and see *Tumey v. Ohio,* 273 U.S. 510 (1927) (impartial judge).

Moreover, even when the substantive rule of *Chapman* is applied to the facts of this case it is apparent that the error complained of cannot be considered harmless. The rule is that the beneficiary of a constitutional error must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California, supra,* 386 U.S. at 24. That rule means that error is prejudicial when there is a reasonable possibility that it had a substantial influence on the minds of the jurors. *Fiswick v. United States,* 329 U.S. 211, 217-220 (1946); *Kotteakos v. United States,* 328 U.S. 750, 764-765 (1946).

That is necessarily the case where the judge has expressed his opinion as to the guilt of the accused. In *Starr v. United States,* 153 U.S. 614, 626 (1894), this Court said:

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intonation is received with deference, and may prove controlling." Accord, *Bollenbach v. U.S., supra,* 326 U.S. at

612; and see *Bihn v. United States*, 328 U.S. 633, 637-38 (1946).[18]

Petitioner was convicted by circumstantial evidence and circumstantial evidence alone. He contradicted directly every bit of testimony and every possible inference that pointed to his guilt. If the error is found harmless it will mean that appellate courts will be resolving questions of credibility from the record before them.

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record. . . ."
>
> *Bollenbach v. United States, supra*, 326 U.S. at 615 (1946).

[18]The judge's admonitions that the jurors were the triers of fact did not, of course, cure the error or make it any the less prejudicial. *Bollenbach v. U.S., supra; United States v. De Sisto*, 289 F.2d 833 (2 Cir. 1961); *McBride v. United States*, 314 F.2d 75 (10 Cir. 1963); *Davis v. United States*, 227 F.2d 568 (10 Cir. 1955); *People v. Bigge*, 297 Mich. 58 (1941). In *Jackson v. Denno, supra*, this Court held that jurors could not reasonably be expected to follow a judge's admonition requesting them to disregard evidence that was improperly admitted. In the instant case they were not admonished to disregard the judge's statement; instead, they were asked to weigh it as they would other testimony.

CONCLUSION

For the aforementioned reasons, petitioner respectfully submits that the relief prayed for be granted.

Dated, San Francisco, California,
January 24, 1968.

Respectfully submitted,

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(Appendices Follow)